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No. 93-808

In the Supreme Court of the United States

OCTOBER TERM, 1993

JERALD FELDMAN, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION AS RECEIVER FOR SENTRY FEDERAL SAVINGS BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether it was proper for the court of appeals to affirm the district court's grant of summary judgment against petitioners on a ground different from the ground on which the district court had relied.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37-61) is reported at 3 F.3d 5. The opinion of the district court (Pet. App. 61-66) is unreported. A related opinion of the court of appeals is reported at 985 F.2d 44.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1993. The petition for a writ of certiorari was filed on November 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December, 1986, Fox Run Realty Trust borrowed $13 million from Sentry Federal Savings Bank. The loan was evidenced by a note in that amount (the Sentry Note), secured by a mortgage on a development called Willowbend. With respect to a portion of the development, the mortgage in favor of Sentry was subordinate to a preexisting mortgage in favor of petitioner Quinaquisset Realty Trust. See Pet. App. 40.

In October, 1987, Fox Run and Quinaquisset engaged in a number of transactions. First, Fox Run conveyed to Quinaquisset certain condominium rights related to Willowbend. At the same time, Fox Run repurchased the condominium rights with a payment of cash and a $1.1 million promissory note payable to Quinaquisset (the Fox Run-Quinaquisset Note). Finally, Quinaquisset released the mortgage it held on a portion of Willowbend (which had the effect of elevating Sentry's mortgage to first priority on the entire development). See Pet. App. 38-40.

The note at issue in this case was created in 1989, when Quinaquisset borrowed $950,000 from Sentry Federal Savings Bank. That loan was evidenced by a note (the Quinaquisset Note) secured by a pledge of the Fox Run-Quinaquisset Note, as well as a personal guaranty by several of petitioners in their individual capacities. See Pet. App. 39.

When Fox Run experienced financial difficulties in 1989, it defaulted on its payments on the Fox Run-Quinaquisset Note and then halted payments to Sentry on the Sentry Note. Quinaquisset, in turn, fell into default on the Quinaquisset Note. After

negotiations between Sentry and Fox Run, Fox Run agreed to convey Willowbend to Sentry, subject to the mortgage in favor of Sentry, in return for Sentry's agreement not to pursue two individual guarantors of the Sentry Note. Sentry thereafter foreclosed on its mortgage; the property was purchased at the foreclosure by Evergreen Holding Company, a wholly owned subsidiary of Sentry. See Pet. App. 41-42.

2. Sentry then brought this suit in state court against petitioners, seeking to enforce the Quinaquisset Note and the related guaranties. When Sentry became insolvent in September, 1990, the Resolution Trust Corporation (RTC) was appointed receiver. After removing the suit to federal court, the RTC pursued the suit in its capacity as receiver for Sentry. Petitioners interposed a number of defenses and raised several counterclaims, generally contending that misconduct by officials of Sentry and its subsidiaries absolved it of any obligation on the Quinaquisset Note and rendered the RTC liable in its capacity as receiver for the failed institution. See Pet. App. 42-43.

On July 19, 1991, the district court granted summary judgment in favor of the RTC. Pet. App. 61-66. The court reasoned that all of petitioners' claims and defenses rested on "personal defenses" that could not succeed "against the FDIC [*sic*] for actions by a failed bank, unless the FDIC is the actor complained of or is not a holder in due course." *Id.* at 64. The court concluded that "[s]ummary judgment is granted to Resolution Trust on its underlying action and the counterclaim is dismissed, all pursuant to the reasoning expressed in *D'Oench Duhme* [*& Co.* v. *FDIC*, 315 U.S. 447 (1942)]." Pet. App. 65-66.

3. The court of appeals affirmed. Pet. App. 37-61. The court's substantive analysis started from its view that petitioners raised only a single claim on appeal: that the RTC could not collect on the Quinaquisset Note because Sentry had impaired the collateral given to secure that note when it foreclosed on Willowbend; that foreclosure, petitioners argued, destroyed the value of the Fox Run-Quinaquisset Note because as a practical matter that note was payable only out of revenues Fox Run received from Willowbend. Pet. App. 45-46. The court stated that "[t]his legal theory represents a substantial winnowing of [petitioners'] claims made in the district court," *id.* at 46, and suggested that petitioners, "whether to avoid *D'Oench Duhme* or for some other reason, * * * ha[ve] now reduced [their] legal position to a single claim * * * and defense * * * based on the impairment of the value of the [Fox Run-Quinaquisset Note]." *Id.* at 47-48.

Turning to the merits of the claim, the court explained that petitioners' "streamlined position may help [them] to avoid application of the *D'Oench Duhme* doctrine—although the RTC claims that the doctrine applies anyway—but the strategy raises its own problem: the lack of any legitimate theory of liability." Pet. App. 48. The court examined Section 3-606 of the Uniform Commercial Code (Mass. Gen. L. ch. 106, § 3-606 (1984)), on which petitioners relied, and concluded that petitioners have no claim under that provision for unjustifiable impairment of collateral. Pet. App. 49-54. The court accepted for the sake of argument the notion that Sentry's foreclosure could be characterized as "impair[ing]" the collateral that secured payment of the Quinaquisset Note, but

reasoned that any impairment was justifiable, because it was caused solely by Sentry's decision to foreclose on a debt owed to it that was in default. *Id.* at 51-53. Because Section 3-606 provides a defense only when the impairment occurs "unjustifiably," the court reasoned that petitioners' claim must fail. *Id.* at 52-54; see § 3-606(1)(b).

ARGUMENT

Petitioners do not challenge the court of appeals' interpretation of Section 3-606 of the Uniform Commercial Code. Pet. 31 ("The erroneous decision of the First Circuit in rejecting the petitioners' defense based on the Massachusetts Commercial Code is not argued here as a reason to grant *certiorari*."). [1] Rather, petitioners argue (Pet. 16-25) that this Court should grant review to consider whether the court of appeals properly determined that it was appropriate to decide the case on that ground rather than the *D'Oench Duhme* ground, on which the district court had relied. [2] That argument presents a factbound contention that does not raise any substantial question of general legal significance. In any event, the court of appeals' mode of disposition of this case constituted a reasonable exercise of an appellate court's discretion.

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[1] In any event, that question would present an issue of state law, which is not ordinarily suitable for review by this Court on certiorari. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 235 n.3 (1991).

[2] Petitioners also argue (Pet. 25-31) that the RTC's reliance on *D'Oench Duhme* cannot support the judgment of the court of appeals. Because the court of appeals had no occasion to consider that question, it is not properly before the Court. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

Petitioners apparently attack the court of appeals' disposition on two separate bases. First, they suggest that the court of appeals erred in concluding that petitioners presented only a single claim on appeal.[3] But petitioners' brief before the court of appeals did not describe or address any other claims.[4] And it is fair to attribute any uncertainty about the matter to petitioners' shifting positions, which—in the court of appeals' view—made it "difficult among the welter of claims to be sure what [petitioners were] actually arguing at various points." Pet. App. 47. The court of appeals' conclusion that petitioners' appeal was limited to the arguments mentioned in their brief was entirely appropriate.

Petitioners also contend (Pet. 19-25) that it was inappropriate for the court of appeals to reject the only claim they raised on a ground not presented to the court by the arguments of the parties. That contention, however, ignores the role of a court in seeking correctly to resolve the controversy before it. Cf. *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73 (1990) (resolving a statutory question by adopting an interpretation of the relevant provisions not supported by

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[3] See Pet. 18 ("[P]etitioners offered one defense and basis for their counterclaims as illustrative of the viable arguments to be presented to a trier of fact."), 19-20 ("[T]he issue before the First Circuit was whether *D'Oench Duhme* doctrine could foreclose all petitioners' defenses and claims, not whether any one particular defense or claim failed.").

[4] Neither in the summary of argument (Pet. C.A. Br. 12-13) nor in the body of the brief (see Pet. C.A. Br. 27-32) does petitioners' brief refer to any claim or defense other than the one addressed and rejected by the court of appeals. For the convenience of the Court, we have lodged a copy of that brief with the Clerk.

any of the parties). In this case, the court of appeals determined that the only claim presented by petitioners suffered from what the court believed to be an obviously dispositive legal flaw. The decision to decide the case on that basis rather than to address arguments that in its view presented more difficult questions was consonant with accepted notions of judicial discretion.

Petitioners' argument (Pet. 20-25) that the decision below conflicts with this Court's decisions in *Helvering* v. *Gowran*, 302 U.S. 238 (1937), and *SEC* v. *Chenery Corporation*, 318 U.S. 80 (1943), as well as the decisions of several lower courts, ignores the nature of the argument accepted by the court of appeals. The decision of the court of appeals rests on the legal conclusion that the action on which petitioners rely for their claim of impairment—Sentry's decision to foreclose on the Sentry Note—cannot as a matter of law constitute unjustifiable impairment actionable under the Uniform Commercial Code. The passages from *Gowran* and *Chenery* on which petitioners rely state that a court that renders a decision on the basis of a legal rule not considered by the lower court should remand to allow the adversely affected party an opportunity for any relevant factual development. But there is no dispute here about the facts on which the judgment of the court of appeals rests; hence, the court of appeals properly determined that a final judgment was appropriate without further proceedings in the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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